FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 4 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 677

GREGOR MURYN,

Petitioner,

versus

THE NEW YORK CENTRAL RAILROAD CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT K. KANAREK,
20 South Broadway,
Yonkers, New York,
Attorney for Petitioner.

INDEX

	PAGE
Opinions Below	1
Basis of Jurisdiction	2
Questions Presented	2
Statement of the Case	2
POINT I—The trial court's improper instructions concerning the applicable law of negligence constitutes fundamental error	5
POINT II—This Court, in order to prevent a miscarriage of justice, has the power to grant a new trial notwithstanding counsel's failure to request instruction or take exception to the Trial Court's charge	10
Reasons for Granting the Writ	12
APPENDIX:	
Opinion of United States Court of Appeals for the Second Circuit	15
Judgment	17

Cases Cited

Arnold v. Panhandle and Santa Fe Railway Co., 353 U. S. 360, 77 S. Ct. 840, 1 L. Ed. 2d 889	8, 12
Bailey v. Central Vermont Railway, 319 U. S. 350, 63 S. Ct. 1062	8
Callen v. Pennsylvania R. Co., 3 Cir., 162 F. 2d 832, 835, aff'd 332 U. S. 625, 68 S. Ct. 296, 92 L. Ed. 242	11
Carpenter v. Baltimore & O. R. Co., 6 Cir., 109 F. 2d 375, 378	8
Hormel v. Helvering, 312 U. S. 552, 557, 558, 61 S. Ct. 719, 85 L. Ed. 1037	11
Jesionowski v. Boston & Maine R.R., 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 355, 169 A. L. R. 947	7

PAGE

Louisiana & Arkansas Railway Co. v. Moore, 5 Cir., 229 F. 2d 1, 3, cert. den. 351 U. S. 952, 76 S. Ct. 849, 100 L. Ed. 1476 11

Lowden v. Hanson, 5 Cir., 134 F. 2d 348 9

N. Y. Central R.R. Co. v. Johnson, 279 U. S. 310, 318-319, 49 S. Ct. 300, 73 L. Ed. 706 11

Richmond F. & P. R. Co. v. Brooks, D. C. Cir., 197 F. 2d 404, 407, cert. den. 344 U. S. 828, 73 S. Ct. 31, 97 L. Ed. 644 11

Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 12

Schwer v. New York C. & St. L. R. Co., 16 Ohio St. 15, 117 N. E. 2d 696 8

Sibbach v. Wilson & Co., 312 U. S. 1, 16, 61 S. Ct. 422, 85 L. Ed. 479 11

Sinkler v. Missouri Pacific R. Co., 356 U. S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799 5

Texas and Pacific Railway Co. v. Buckles, 5th Cir., 232 F. 2d 257, 264, n. 17, cert. den. 76 S. Ct. 1052.. 7

U. S. v. Atkinson, 297 U. S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555 11

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 8

Statutes Cited

28 U. S. C. 1254(1) 2

28 U. S. C. 1331 2

45 U. S. C. 51 ..... 2, 3, 5, 6, 9

45 U. S. C. 53 5

45 U. S. C. 54 5

45 U. S. C. 56 2

IN THE

Supreme Court of the United States

October Term, 1959

No.

GREGOR MURYN,

Petitioner,

versus

THE NEW YORK CENTRAL RAILROAD CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review a judgment of the Court of Appeals for the Second Circuit, entered the 7th day of October, 1959, and said Court's order denying a petition for rehearing dated the 11th day of January, 1960.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court, Southern District of New York, appears in the record at page 76a. The opinion is also reported in 270 F. 2d 645. The denial, without opinion, by said Court of Appeals of petitioner's petition for rehearing appears in the record at page 99a.

Basis of Jurisdiction

The jurisdiction of this Court is based upon 28 U. S. C. 1254(1).

Jurisdiction in the Federal Court was based upon 28 U. S. C. 1331 as an action arising under the laws of the United States (45 U. S. C. 51 *et seq.*) involving an amount in excess of the requisite jurisdictional amount and upon 45 U. S. C. 56.

Questions Presented

The questions presented are as follows:

1. Whether the United States District Court for the Southern District of New York improperly applied the applicable provisions of the Federal Employers Liability Act in its instructions to the jury so as to deny to petitioner his right to trial by jury in contravention with controlling decisions of the Supreme Court of the United States.

2. Whether this Court, in order to prevent a miscarriage of justice, has the power to grant a new trial notwithstanding counsel's failure to request instructions or take exception to the Trial Court's charge.

Statement of the Case

The facts and circumstances surrounding the litigation, insofar as they are pertinent, may be briefly stated. Petitioner was employed by The New York Central Railroad in New York City as a "railroad car inspector" (App. 5a).* While petitioner was awaiting an elevator on defendant's premises (App. 6a, 7a) an electrical transporter operated by another employee of the railroad passed by

* Numbered references preceded by the word "App." refer to pages in the Record Appendix submitted to the Court of Appeals for the Second Circuit.

within said area, and very near to certain stationary objects (App. 37a, 43a, 44a, 46a, 74a). Suddenly a metal pipe was caused to be catapulted out of the vehicle at great speed, striking and very seriously injuring the plaintiff who was standing some fifteen to twenty feet away. No one apparently witnessed the inception of this extraordinary occurrence (App. 46a, 9a).

Plaintiff instituted suit against the Railroad to recover damages for his injuries resulting as aforesaid. The case was governed *exclusively* by the Federal Employers Liability Act (45 U. S. C. A., Section 51, *et seq.*), and the various duties and obligations of the Railroad for protection of its employees arising under said Act, and the related Acts of Congress. The Railroad presented no evidence in opposition to the plaintiff's case. The plaintiff's testimony regarding the manner in which the accident happened was not contradicted by defendant. Nor was any evidence submitted to explain how the pipe was catapulted at great speed out of the mechanical device, when in the usual course of events such an occurrence was extraordinary and not to be anticipated, indicating a defective and unsafe condition of said contrivance. No testimony was presented to indicate that the machine had ever been inspected; nor that reasonable care had been exercised in its maintenance; nor that the driver was physically qualified to operate same; or that adequate safety rules for its operation and loading had been promulgated and enforced, although the pleadings clearly put these factors in issue.

The jury was then charged merely that the case was controlled by theories of negligence under the Federal Employers Liability Act. But in paraphrasing a portion of said Act the court omitted any reference to the provision therein which sets forth the liability of the *railroad itself*, and further charged that application of the Act to the case at bar required only a determination of whether

or not the *driver* of defendant's vehicle acted reasonably in his operation thereof." The Court failed to define the fundamental duties of the *railroad* under the Act to properly maintain its equipment and to promulgate and enforce adequate safety rules for the protection of its employees. The Court further failed to apprise the jury of the well defined obligation of the railroad to provide its employees with a safe place to work. Nor was the jury charged that the failure of the defendant to explain this extraordinary occurrence warranted an inference of defendant's negligence.

No requests for charge were submitted by counsel which would have required the case to be submitted in accordance with FELA principles, nor did the Court itself enlighten the jury. That the jury did not understand the duty of the railroad nor the applicable theories of negligence is apparent from their request to the Court to redefine that portion of its charge concerning "negligence" (App. 67a). The Court again failed to aid the jury, and merely repeated parts of its original charge, adding a general description of the reasonably prudent man as applied to the driver of the transporter, and simply drawing an analogy with an *automobile accident case:*

> "In other words, it is a test of what a reasonably prudent man would do or would not do. It requires ordinary reasonable care. It is a type of question which a jury particularly is equipped to deal with, because you are applying the rule of what an ordinary reasonable man would do in carefully handling a transporter, let us say, the *same question* you would have if you were deciding whether somebody *operated an automobile in a negligent manner* . . . ." (emphasis supplied) (App. 68a, 69a).

Thus the governing principle of law presented to the jury was that of ordinary common law negligence in ordinary situations instead of the entirely different concepts evolved under the FELA. Petitioner has been thereby

deprived of his right to have his claim determined under the criteria set forth in the Federal Act and has been deprived of the equally important and concurrent right to have a jury determination of whether the respondent is liable under the FELA rules of liability.

POINT I

The trial court's improper instructions concerning the applicable law of negligence constitutes fundamental error.

The improper instructions of the Trial Court defined and confined petitioner's claim under the FELA in a manner contrary to applicable decisions of this Court and contrary to the fundamental purposes of the FELA. The statute was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. An avowed departure from the rules of the common law, the FELA seeks to adjust the cost of human injury, an inescapable expense of railroading, to the strength of those who, in the nature of the case ought to share the burden. See:

Sinkler v. *Missouri Pacific R. Co.*, 356 U. S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799.

The common law tort principles of liability were radically altered by a number of provisions evident on the face of the Act itself. For instance, the harsh rule of contributory negligence has been banished in favor of the more humane doctrine of comparative negligence (45 U. S. C. A. Section 53); the theory of assumption of risk has also been specifically discarded (Section 54); and the torts of the fellow-servant have been made the absolute responsibility of the Railroad (Section 51). Furthermore, the Act provides that the Railroad shall be liable for injuries

which have resulted merely "in part" from the negligence of its officers, agents, or employees, *or* by reason of, "*any defect or insufficiency*, due to *its* negligence, in *its equipment*" (emphasis supplied) (Section 51).

In its charge in the instant case, the Court paraphrased Section 51 of the Act, as follows:

> "Plaintiff claims this action under a law known as the Federal Employers Liability Act passed by Congress, and this law must be applied by this Court and the jury. This act provides that every Railroad shall be liable in damages to any employee suffering injury in the course of his employment where the injury resulted in whole or in part from the negligence of any officer, agent or employee of such railroad." (App. 56a, 57a)

This part of the charge was manifestly inadequate since it omitted that portion of Section 51 which refers to negligence of the *Railroad itself* (as contrasted with that of its officers, agents or employees).

By reason of this omission the jury was obliged to apply only one half of the main operative provision of the Act, and remained unaware of that portion concerning equipment, which was particularly applicable where, as here, an extraordinary malfunction of a piece of equipment may be inferred.

The remainder of the charge, insofar as it pertained to negligence, referred only to the duty of reasonable care which Roberts (the driver) owed to the plaintiff, to wit:

> "If the jury finds that *Roberts* failed to operate his transporter with reasonable care, and that as a result thereof plaintiff was caused to be injured, then your verdict should be for the plaintiff . . . The first issue which you have to determine is, therefore, was there *negligence of a co-employee* and did that negligence cause the injury to the plaintiff. The burden of proof is upon the plaintiff to establish that *Roberts* was negligent." (App. 57a)

Thus, when the Court sought to apply the Act to the situation at bar, its charge was equally inadequate and misleading, and in conflict with fundamental principles evolved in a long line of judicial interpretations of the Act:

(a) The doctrine known as *res ipsa loquitur* is liberally applied in cases brought under the Act because of the Railroad's complete control over conditions of labor and equipment. An inference of negligence is warranted under this principle where the injury would not occur in the normal course of events had reasonable care been exercised by those in control of the instrumentality causing it. *Jesionowski* v. *Boston & Maine R. R.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 355, 169 A. L. R. 947. Furthermore, a plaintiff is no longer penalized for bringing in all the specific and definite evidence he has, and is entitled nevertheless to the benefits of the doctrine, and to an instruction to the jury to this effect. *Texas and Pacific Railway Co.* v. *Buckles*, 5th Cir., 232 F. 2d 257, 264, n. 17, cert. den. 76 S. Ct. 1052.

The case at bar is a classic one for application of the doctrine. The instrumentality was entirely within the defendant's control, while the plaintiff stood by innocently, some distance away. A metal pipe would not be catapulted some 15-20 feet at great speed in the ordinary course of human experience, but for the negligence of the defendant. The defendant did not offer a satisfactory explanation, in fact it did not offer *any* explanation despite plaintiff's evidence which indicated that no one had actually seen the occurrence, and served to raise an inference of defendant's negligenc. In this state of the facts, plaintiff was clearly entitled to the strongest sort of instruction concerning the inference to be considered by the jury. This the Court failed to do and instead charged almost the converse, while restricting the possibility of defendant's negligence to the driver's actions alone, as follows:

> "If the jury should find that the plaintiff has not established by a fair preponderance of the evidence

that Roberts was negligent, or failed to exercise ordinary and reasonable care; then, of course, the mere occurrence of the accident would not in and of itself require a judgment for plaintiff." (App. 57a)

Such a charge, under a similar set of facts, was held *improper* in *Carpenter v. Baltimore & O. R. Co.*, 6 Cir., 109 F. 2d 375, 378.

(b) The railroad has a duty to furnish its employees with a reasonably *safe place to work*, under the FELA. The term negligence, as used in the Act, has been interpreted as a violation of that duty. *Bailey v. Central Vermont Railway*, 319 U. S. 350, 63 S. Ct. 1062; *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. These cases uniformly sustain the right of the jury to determine whether the railroad has met its duty in this regard. In the case at bar, the jury was never advised that the railroad's liability could be predicated upon the violation of this duty, despite evidence that a safe place to work had not been provided.

In a case similar to the one at bar, the jury specifically found that: there was *no negligence* in the failure of the driver to keep a proper lookout; the truck *did not* back up too fast, *was not* driven negligently without adequate visibility; *plaintiff failed* to keep a proper lookout, and that this was a *partial cause* of the accident. The Supreme Court there held that these findings "concerned negligence only in the operation and presence of the truck on the passageway"; that these grounds do not exhaust the possible grounds upon which negligence of the railroad may be predicated and that the verdict for the plaintiff based upon the jury's unsafe-place-to-work finding, must be upheld. *Arnold v. Panhandle and Santa Fe Railway Co.*, 353 U. S. 360, 77 S. Ct. 840, 1 L. Ed. 2d 889.

(c) The Railroad has the duty of promulgating and enforcing *adequate and proper safety rules* for the protection of its employees, *Schuer v. New York C. & St. L. R. Co.*, 16 Ohio St. 15, 117 N. E. 2d 696.

In the instant case, safety rules were essential to ensure (1) that the transporter would be carefully loaded, (2) that the objects carried would be securely held and not easily dislodged, (3) that the transporter would be operated at a proper rate of speed, and (4) that sufficient space without obstruction would be provided for safe passage of the vehicle and its cargo. Despite the extraordinary nature of the accident in the case at bar, no evidence of any safety rules or precautions taken for benefit of workers was presented by defendant. No mention *whatsoever* was made in the Court's charge of defendant's duty in this respect, despite the strong inferences raised that defendant was derelict therein.

(d) The railroad has the duty of *inspecting* its property and equipment and *maintaining* it in proper working condition, *Lowden* v. *Hudson*, 5 Cir., 134 F. 2d 348, in order to discover and correct any "defect or insufficiency" (45 U. S. C. A. 51). Defendant presented no evidence that this requirement was satisfied, although the nature of the accident raised an inference that the transporter was defective or insufficient for the purposes intended. The Court in its charge entirely ignored the Railroad's duties in this regard, even though the pleadings had put them in issue.

It is clear that the jury was given improper instructions. The impropriety of the charge was not merely a technical defect or inner contradiction, but the most fundamental type of error, going to the heart of the theory of negligence under the FELA. Although the liability of the Railroad must still be measured in terms of negligence, it must be applied in the context of the Acts of Congress and the various decisions interpreting them.

In view of the difficulty experienced by lawyers and Courts in grasping the full implications of the FELA, it would be virtually impossible to expect a lay jury to make a proper determination on the basis of an improper and

inadequate charge. The standard of care was not merely ordinary care, as in an automobile collision, but rather the highest degree of care owed by the Railroad for the safety of its employees under the Act. The petitioner has been effectively deprived of any jury determination as to whether the respondent has failed to meet the standard of care required by the Act.

POINT II

This Court, in order to prevent a miscarriage of justice, has the power to grant a new trial notwithstanding counsel's failure to request instruction or take exception to the trial court's charge.

Admittedly plaintiff did not request instructions which properly embodied the applicable law of this case, but the Trial Court was similarly derelict in failing to properly charge the jury. As a result, plaintiff was, in effect, denied a fair trial.

Even in cases where a party has failed to strictly adhere to the Federal Rules of Civil Procedure, appellate tribunals have, in the interest of justice, sought on their own motion to safeguard the rights of those who would otherwise suffer. To this effect, this Court has stated:

> "*Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.* A rigid and undeviating judicially declared practice under which Courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice * * *. These decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate Courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that *such appellate practice should not be applied*

where the obvious result would be a plain miscarriage of justice * * *." Hormel v. Helvering*, 312 U. S. 552, 557, 558, 61 S. Ct. 719, 85 L. Ed. 1037.

In the present situation, the failure to charge regarding the true nature of the Railroad's duty under the FELA is plain error of the most fundamental kind, since it involves the basic principles on which liability for the entire case rests. Nothing could be more important than that specific aspect, and it does not serve the ends of justice to say that it was error on one side or the other. The point is that the entire case was not decided on necessary and fundamental principles applicable to the situation.

In the present case there has been both (1) plain error of a fundamental nature and (2) an error which has seriously affected the justice and fairness of the judicial proceeding in which petitioner's claim *under the FELA* has been determined by dilution of this claim into a common law motor vehicle accident claim. Where either one of these factors was present Appellate Courts have taken notice of the error despite the absence of an objection or assertion of error in the Trial Court. *Sibbach v. Wilson & Co.*, 312 U. S. 1, 16, 61 S. Ct. 422, 85 L. Ed. 479; *United States v. Atkinson*, 297 U. S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555; *N. Y. Central R. R. Co. v. Johnson*, 279 U. S. 310, 318-319, 49 S. Ct. 300, 73 L. Ed. 706. Failure to object to instructions in FELA and similar cases does not bar the Appellate Court from reviewing such instructions where the instructions constitute fundamental error or prevent a fair trial of the statutory claim. *Louisiana & Arkansas Railway Company v. Moore*, 5 Cir., 229 F. 2d 1, 3, cert. den. 351 U. S. 952, 76 S. Ct. 849, 100 L. Ed. 1476; *Richmond, F. & P. R. Co. v. Brooks*, D. C. Cir., 197 F. 2d 404, 407, cert. den. 344 U. S. 828, 73 S. Ct. 31, 97 L. Ed. 644; *Callen v. Pennsylvania R. Co.*, 3 Cir., 162 F. 2d 832, 835, affd. 332 U. S. 625, 68 S. Ct. 296, 92 L. Ed. 242.

On the evidence here presented a motion for a directed verdict might well have been made, but at this point, plaintiff seeks only a new trial to the end that he will at long last receive the day in court to which he is entitled under the Federal Act and that the basis of liability of the defendant will be correctly presented.

Reasons for Granting the Writ

1. The instructions given in the Trial Court are in conflict with the due care required of the railroad under the provisions of the F.E.L.A. and with the decisions of this Court relating to said statutory standard of care. Petitioner's asserted rights under the Federal Act have not been enforced or protected in the manner intended by Congress in that the Trial Court failed to give recognition to the variety of duties encompassed by the statutory standard and instead confined the petitioner's claim to a single aspect of the broad duties established by the Congressional enactment. *Arnold* v. *Panhandle & Santa Fe Railway Co.*, *supra*.

2. The instructions given in the Trial Court deprived the petitioner of his right to a jury determination of whether the respondent had failed in any respect to exercise the due care required of it by the Federal Act. The instant instructions constitute an improper administration of the Act with an ensuing erosion of its substantive provisions, contrary to the intention of Congress. *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500, — S. Ct. —; — L. Ed. —.

The fact that the error herein occurred when the petitioner's claim was submitted to the jury for determination rather than after a jury determination, as when the trial court sets aside a jury verdict, does not affect the result. In either case, the plaintiff is deprived of a jury verdict under the controlling provisions of the Federal Act. Thus, in the instant case, the improper instructions prevented the jury from determining whether the respondent was liable under the guiding rules of the Federal Act.

3. Equally important as its immediate bearing upon the present lawsuit, is the far reaching effect of this Court's decision upon the future trial of railroad employee cases. This Court should not allow to stand unchallenged a charge to the jury which in effect equates the applicable law of negligence under the FELA with that of an ordinary automobile collision case.

Still, for the plaintiff and his family more than the mere vindication of an abstract principle is involved. The severe injuries sustained by him have left him to this day, at the age of thirty-four, a semi-invalid in constant pain. No longer physically able to perform his former work for the railroad and unskilled in other lines, he is reduced to part-time employment at a clock factory. Here he is required merely to sit while thus engaged. His salary is $56 per week whereas his former co-workers at the railroad now earn $100 per week. Still the sole support of his wife and four children, he is dependent in part on Welfare assistance. His future prospects have been irrevocably damaged by an injury incurred while he was concededly an innocent bystander.

WHEREFORE, your petitioner prays that a writ of certiorari may issue, directed to the United States Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court a full and complete transcript of the record of all proceedings had in said Court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law; and upon said determination to reverse the judgment of the Court of Appeals and direct that a new trial be held, or for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

HERBERT K. KANAREK,
20 South Broadway,
Yonkers, New York,
Attorney for Petitioner.

APPENDIX

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 9—October Term, 1959

(Argued October 7, 1959 Decided October 7, 1959.)

Docket No. 24470

GEORGE MURYN,

Plaintiff-Appellant,

—v.—

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant-Appellee.

Before:

LUMBARD, WATERMAN, and FRIENDLY,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Dawson, J., upon a jury verdict for the defendant in a suit under the Federal Employers Liability Act, 45 U. S. C. 51 et seq. Affirmed.

DANIEL GALINSON, New York, N. Y. (BROMSEN & GAMMERMAN, New York, N. Y., on the brief), for plaintiff-appellant.

WILLIAM L. SHUMATE, New York, N. Y. (GERALD E. DWYER, New York, N. Y., on the brief), for defendant-appellee.

PER CURIAM:

The plaintiff, having consented to go to the jury on the factual issues, by his failure to move for a directed verdict, will not be heard now to challenge the verdict for the defendant on the ground of the insufficiency of the evidence. Jorgensen v. York Ice Machinery Corporation, 160 F. 2d 432 (2 Cir. 1947).

In any event, we are of the opinion that a jury question was presented by the evidence regarding the operation by the defendant's employee of an electrical transporter, as a result of which a three foot iron pipe was thrown through the air striking and injuring the plaintiff.

Judge Waterman concurs in the result.

Judgment affirmed in open court.

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of October, one thousand nine hundred and fifty-nine.

Present:

HON. J. EDWARD LUMBARD,
" STERRY R. WATERMAN,
" HENRY J. FRIENDLY,
Circuit Judges.

GREGOR MURYN,
Plaintiff-Appellant,

—v.—

THE NEW YORK CENTRAL RAILROAD CO.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Supreme Court, U.S.
FILED
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 677

GREGOR MURYN,

Petitioner,

versus

THE NEW YORK CENTRAL RAILROAD CO.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERALD E. DWYER,
Attorney for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 677

GREGOR MURYN,

Petitioner,

versus

THE NEW YORK CENTRAL RAILROAD CO.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of Facts

The accident out of which this cause of action arises occurred about 11 p. m. on August 11, 1953, when a piece of iron pipe was dislodged from an electric transporter and struck the plaintiff-petitioner.

The plaintiff was employed by the defendant as a car inspector. At the time the accident occurred he was standing near an elevator shaft on the south side of a corridor 25 or 30 feet wide which runs east and west below the lower level

of Grand Central Terminal in New York City (6a, 7a). Another employee of the defendant, John L. Roberts, was operating an electric transporter in an easterly direction through the corridor. This transporter was approximately thirty inches wide, and, including the handle, was about eleven feet long. It was operated by the front handle, so that Roberts was walking in front of it (32a).

A photograph of a transporter similar to the one here involved was put in evidence as Plaintiff's Exhibit "4" (31a, 32a, 72a). A photograph showing the general physical layout of the corridor was put in evidence as Plaintiff's Exhibit "7". This photograph does not portray the conditions in the corridor as they were at the time of the accident (39a, 74a).

Roberts, when called as a witness by the plaintiff testified as to the happening of the accident. He said that he had been using the transporter to take a coffin to a platform and load it into the baggage car of a train. In getting the coffin into the baggage car he used a metal pipe about 1½ inches in diameter as a roller (35a). He then placed the pipe on the transporter and started to take the transporter back to the baggage room. As to the placing of the pipe on the transporter, he testified (35a, 36a).

> "Q. After you had unloaded the coffin did you place the pipe back on the transporter? A. I placed the pipe back on the transporter between the two lids and raised up the lid so the pipe will fit inside and keep from falling off the platform.
>
> Q. That pipe then was across the width of the transporter; is that right? A. Across the width, yes, sir.
>
> Q. And how wide was the transporter? A. Oh, let's say about that wide (indicating).
>
> Mr. Gammerman: Would you say that that is about 2½ to 3 feet, Mr. Cusack?
>
> The Witness: That's the front part.

Mr. Cusack: I think that is right.

Q. How far did the pipe protrude on either end, on either side of the transporter? A. About five inches on each side, I believe."

Roberts took elevator 24 from the platform down to the corridor and was proceeding in an easterly direction along the corridor to get to elevator 9 or 10, to go back up to the baggage floor (36a). Elevator shafts 9, 10, 11, 12 and 24 are all located along the south wall of the corridor. Shaft 24 is located furthest to the west, and then east of it in the following order are shafts 12, 11, 10 and 9 (36a). As he was proceeding down the corridor toward shaft 9, an electric truck loaded with mail was standing in the corridor in front of shaft 11 waiting for the elevator (37a). This truck was 3½ or 4 feet wide and 10 or 11 feet long and was protruding out into the corridor (37a). Alongside the opposite or north wall of the corridor to the east of the mail truck, there were two skids loaded with mail (38a). Each skid was about 18 feet long (38a). These skids were not directly opposite the mail truck but were a little to the east of it, so that the transporter would first have to pass the truck and then pass the skids (42a). In passing between them there was a clearance of about 12 inches on either side.

When Roberts was approaching this truck and was about six feet west of it, he saw the plaintiff come out of a door along the north wall of the corridor opposite the elevators. Roberts said that the plaintiff saw him coming with the transporter and stopped near the south wall of the corridor to let the transporter go by (40a, 41a). After Roberts himself had passed between the electric truck and the skids (45a) the transporter ran "too close to the truck" and the pipe caught in the truck and was propelled forward, striking the plaintiff (46a).

Roberts had been working for the defendant as a mail and baggage handler since June 21st, 1950 (30a). He regularly used electric transporters in his work (48a).

POINT I

The charge to the jury fully and fairly covered the issues raised by the proofs.

The Court charged the jury that the case was brought under the Federal Employers Liability Act and that the Act provides that:

> "every railroad shall be liable in damages to any employee suffering injury in the course of his employment where the injury resulted in whole or in part from the negligence of any officer, agent, or employee of such railroad." (57a)

The petitioner contends that the Court should also have told the jury that the Act imposed liability upon a railroad where the injury is caused by reason of "any defect or insufficiency, due to its negligence in its * * * equipment" (Petition, p. 6).

There was no proof of any defect or insufficiency in the transporter. In fact it affirmatively appeared from the testimony of Roberts as to the facts and circumstances surrounding the happening of the accident that no defect or insufficiency in the transporter was involved. Obviously trial counsel for the plaintiff, an attorney of wide experience in the trial of cases under the Federal Employers Liability Act, had no thought that a defect or insufficiency in the transporter was involved since he made no request for a charge on that point.

The only question presented by the evidence was whether or not Roberts' conduct in the use and management of the

transporter measured up to the standard of reasonable care under the circumstances; whether or not he acted as a reasonably prudent man. This issue was submitted in a charge which was eminently fair to the plaintiff.

CONCLUSION

The petition should be denied.

Respectfully submitted,

GERALD E. DWYER,
Attorney for Respondent.